

4 October 1957

MEMORANDUM FOR: Executive Officer, 

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SUBJECT: "Rank" of ODM Director and AEC Chairman

1. Mr. Warner has asked me to reply to your inquiry with respect to the ranking of the two subject officers and to comparing them to Cabinet officers. Let me say right at the beginning that the Cabinet as we know it--that is, a body, a council, which holds meetings and tenders advice as a group to the President--is something unknown to the Constitution. The Executive Departments are enumerated in 5 U.S.C. 1. "The heads of Executive Departments are commonly called the Cabinet." 36 Opinions of the Attorney General 12 (1929). The Cabinet exists really mostly as a matter of tradition. The practice of calling together the heads of the Executive Departments was instituted by President Washington and has continued ever since, and the term "cabinet" was borrowed as a convenient way to refer to that group. It's significance as a group has varied from one of great decision making to one of little more than social or ceremonial connotation.

2. Article 2, Section 2 of the Constitution, prescribing how officers of the United States shall be appointed, declares that "the President shall nominate and, by and with the advice and counsel of the Senate, shall appoint Ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they may think proper in the President alone, in the courts of law, or in the heads of departments." As we see, the Constitution divides officers of the Executive branch into two classes, at least for the purpose of appointment. The first class requires nomination by the President and confirmation by the Senate. The framers, foreseeing the inconvenience of this mode in the future, when offices would become more numerous, provided a second class, inferior to the first, the appointment of whose members might be vested by Congress in the President, the courts, or the heads of departments.

3. In the same section of the Constitution it is said that the President "may require the opinion, in writing, of the principal officer in each of the Executive Departments, upon any subject relating to the duties of their respective offices..." These provisions are all that remain of the idea, strong in the Constitutional Convention, to provide the President with an advisory council--or to impose one upon him. The word "department" in both these instances means the same thing, and the principal officer in the one case is the equivalent to the head of the department in the other. U.S. vs. Germaine 25 L. Ed. 482, 483.

5. In the 1956 Pay Act the Director of the Office of Defense Mobilization is named in the second group of officers and his salary is set at \$22,500, the others in this group are the Director of the Bureau of the Budget, the Comptroller General, the Under Secretary of State, the Deputy Secretary of Defense. The ODM Director is thus placed for salary purposes between the Cabinet Members, who receive \$25,000, and the three service secretaries, who receive \$22,000. The other officer with whom we are concerned, the Chairman of the Atomic Energy Commission, is not included in the Act.

6. The Atomic Energy Commission was established by Act of Congress in 1946. The Special Senate Committee on Atomic Energy, recommending passage of the bill, stated, "A salary of \$17,500 per annum for the Chairman and \$15,000 for the other commissioners has been set to indicate that the duties and responsibilities of these positions are comparable to those on the highest level of Government administration. In 1950 a joint committee on atomic energy recommending passage of an act to amend the 1946 Act said the following:

"In 1946, when the McMahon Act was passed, the Atomic Energy Commission Chairman was deliberately given a higher rate of compensation than that prevailing at the time for Cabinet Members; and AEC commissioners were paid at the same rate as Cabinet Members. The legislative history of the McMahon Act indicates that Congress so vested these salaries in the knowledge that the Commission would bear an unparalleled weight of responsibility. Such responsibility continues unchanged today. . . ."


The amending act set the Chairman's salary at \$20,000. 42 U.S.C. 2032. On 4 September his salary was raised by Congress to \$22,500. P.L. 85-287, 71 Stat 612.

7. The present Office of Defense Mobilization was established by reorganization plan under 5 U.S.C. 133 rather than by direct action of Congress. The Director's salary was set at \$22,500; at that time Cabinet Members also received that amount. The President stated in his letter transmitting the plan to Congress following the customary language of such letters, "The rates of compensation passed for those officers (the Director and Deputy Director of Defense Mobilization) are respectively those which I have found to prevail in respect to comparable officers of the executive branch of the Government.

8. Insofar as salary is a guide, then, it would appear that at the time of the inception of their respective establishments the Director of Defense Mobilization was rated by the President and the Congress as equal to Cabinet Members, and the Chairman of the Atomic Energy Commission was rated by Congress as higher. By the same token,

both are now placed one cut below Cabinet Members. No doubt the President could make them members of his "cabinet" merely by declaring that he had done so. To do so, however, would be to break a tradition which is very strongly implanted in our system. I do not doubt that regardless of the salaries of these individuals or the importance of their work, the social aspects of officialdom (which may come very much into play in purely official activity) would preclude any officer of the Government from rising to a higher "rank" than the head of any Executive Department.

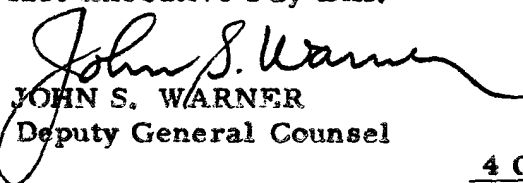
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Office of General Counsel

MEMORANDUM FOR: MR. EARMAN 

Re your query on Cabinet status of ODM and AEC, I think Mr. Dulles will find some of the points in the attached memorandum extremely interesting such as the original establishment of ODM at a salary level equal to Cabinet and establishment of the Chairman of AEC at a higher salary level. Of course, these have been corrected by time and the last Executive Pay Bill.

  
JOHN S. WARNER  
Deputy General Counsel

4 October 1957  
(DATE)